

**United States Department of Labor
Employees' Compensation Appeals Board**

D.F., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
WARNER ROBINS AIR FORCE BASE, GA,
Employer**

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**Docket No. 09-1080
Issued: December 7, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 16, 2009 appellant filed a timely appeal from a March 2, 2009 merit decision of the Office of Workers' Compensation Programs denying his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established that he sustained noise-induced hearing loss causally related to factors of his federal employment.

On appeal, appellant contends that the Department of Veterans Affairs accepted his hearing loss as related to his military service and was worsened by his civil service work environment.

FACTUAL HISTORY

This case has previously been before the Board. On August 31, 2007 appellant, then a 62-year-old inventory management specialist, filed an occupational disease claim (Form CA-2)

for hearing loss. The Office denied his claim on the grounds that the weight of the medical evidence rested with Dr. Kenneth Walker, a Board-certified otolaryngologist, who determined that, although appellant's workplace noise exposure was sufficient to have caused hearing loss, it was due to presbycusis rather than his employment. By decision dated November 10, 2008, the Board remanded the case for further development. The Board found that Dr. Walker's report did not provide sufficient medical rationale to support his opinion that appellant's hearing loss was not related to his employment. The Board directed the Office to obtain a supplemental report from Dr. Walker clarifying his opinion.¹

On remand, the Office requested that Dr. Walker clarify his opinion as to whether appellant's hearing loss was related to his employment. The record reveals that Dr. Walker declined to provide a supplementary report and the Office referred appellant, along with his record and a statement of accepted facts, for a second opinion evaluation with Dr. Kevin A. O'Connell, a Board-certified otolaryngologist.

In an undated medical report, Dr. O'Connell stated that appellant experienced mild hearing loss in 1988.² He indicated that appellant did not show a sensorineural loss in excess of what would normally be predicated on the basis of presbycusis. Dr. O'Connell stated that, although the frequency and duration of appellant's workplace exposure possibly could have caused hearing loss, he was not provided information as to the intensity or decibel level of exposure. He diagnosed presbycusis and bilateral high frequency sensorineural loss. Dr. O'Connell opined that the loss was not due to appellant's federal employment and that the current audiometric findings were not consistent with a noise exposure configuration. An accompanying February 25, 2009 audiogram revealed hearing levels of 25, 25, 35 and 45 decibels in the right ear and 20, 25, 40 and 45 decibels in the left ear at 500, 1,000, 2,000 and 3,000 hertz, respectively. Appellant had a speech reception threshold at 25 decibels in the right ear and 20 decibels in the left ear. His auditory discrimination scores were 90 percent in both ears.

By decision dated March 2, 2009, the Office denied appellant's claim for hearing loss based on Dr. O'Connell's opinion that the loss was caused by presbycusis and not employment-related noise exposure. It found that he did not establish that his hearing loss was due to his employment.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁴ including that he is an "employee" within the meaning of

¹ Docket No. 08-1458 (issued November 10, 2008).

² An April 1988 audiogram showed hearing levels of 20, 20, 25 and 35 decibels in the right ear and levels of 15, 20, 25 and 25 in the left ear at 500, 1,000, 2,000 and 3,000 hertz, respectively.

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB ____ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

the Act⁵ and that he filed his claim within the applicable time limitation.⁶ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁸

ANALYSIS

The issue is whether appellant established that he sustained hearing loss due to his federal employment duties. Dr. Walker, the Office's second opinion physician, opined that appellant's hearing loss was due to presbycusis rather than work-related noise exposure even though appellant's work exposure was sufficient to cause hearing loss. The Board found that his opinion was of diminished probative value, as it lacked rationale and remanded the case for further development. On remand, the Office properly referred appellant for another second opinion evaluation with Dr. O'Connell, a Board-certified otolaryngologist as Dr. Walker declined to provide a supplemental opinion.⁹ The Board finds Dr. O'Connell's report is also of diminished probative value.

In an undated report, Dr. O'Connell stated that appellant did not show sensorineural loss in excess of what would normally be predicated on presbycusis. However, he diagnosed presbycusis and bilateral high frequency sensorineural hearing loss. Further, Dr. O'Connell stated that the frequency and duration of appellant's workplace noise exposure could possibly cause hearing loss but that he was not provided with the decibel level of exposure. He also opined that appellant's hearing loss was not related to his employment because his current audiometric findings were not consistent with a noise exposure configuration.

The Board finds that Dr. O'Connell's report is not sufficient on the issue of causal relations. Although he stated that appellant did not demonstrate sensorineural loss in excess of

⁵ See *M.H.*, 59 ECAB ____ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); see 5 U.S.C. § 8101(1).

⁶ *R.C.*, 59 ECAB ____ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); see 5 U.S.C. § 8122.

⁷ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁹ When a medical evaluation is made at the request of the Office, it has the responsibility of having a proper evaluation made. *Leonard Gray*, 25 ECAB 147, 151 (1974).

what would normally be predicated on presbycusis, he diagnosed both bilateral high frequency sensorineural hearing loss and presbycusis. Dr. O'Connell's report lacks adequate medical rationale to support his conclusion that appellant's hearing loss was not related to his employment. The only explanation he provided is that appellant's current audiometric findings were not consistent with a noise exposure configuration. However, Dr. O'Connell did not provide a full explanation of how appellant's loss was inconsistent with such a configuration. Moreover, he opined that appellant's employment exposure could be a possible cause of hearing loss but that he was not provided with information on specific decibel levels of exposure. The Board notes that, although the statement of accepted facts listed appellant's jobs and sources of noise, specific noise levels were not provided by the employer.¹⁰ Therefore, Dr. O'Connell was not provided with information relevant to the claim and his medical report is of diminished probative value.¹¹

It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.¹² When the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.¹³ Because it referred appellant to a second opinion physician, it has the responsibility to obtain a report that will resolve the issue of whether his hearing loss was caused by his federal employment.¹⁴ As Dr. O'Connell's report is deficient, this case will be remanded to the Office for further development of the evidence. As the Office has not requested the employing establishment to submit detailed information about appellant's noise level exposure, including copies of noise level surveys and specific decibel levels for each work location.¹⁵ On remand, it should request that the employing establishment provide such information.¹⁶

¹⁰ To be probative, a physician's report must be based on a complete factual and medical background. *See A.D.*, 58 ECAB ____ (Docket No. 06-1183, issued November 14, 2006).

¹¹ *See T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009); *Robert C. Pearson*, 32 ECAB 403 (1980).

¹² *P.K.*, 60 ECAB ____ (Docket No. 08-2551, issued June 2, 2009).

¹³ *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

¹⁴ *See Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

¹⁵ It is generally accepted that hearing loss may result from prolonged exposure to noise levels above 85 decibels. However, acoustic trauma may also result from decibel levels below 85 decibels if exposure is specifically prolonged. Consequently, regardless of appellant's specific decibel level of exposure, the referral physician must also consider whether the employment-related noise exposure was specifically prolonged to result in acoustic trauma. Such a question is medical in nature and should be resolved by a Board-certified otolaryngologist. *See R.B.*, 60 ECAB ____ (Docket No. 08-1662).

¹⁶ The Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. *See R.E.*, 59 ECAB ____ (Docket No. 07-1604, issued January 17, 2008). *See also id.* (Where the Board remanded the case due to the Office's failure to obtain evidence regarding the level and duration of appellant's noise exposure from the employing establishment).

CONCLUSION

The Board finds this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this opinion.

Issued: December 7, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board